

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

AARON WILLIAMS, on behalf of himself and
all others similarly situated,

Plaintiff,

v.

PILLPACK LLC,

Defendant.

No. 3:19-cv-05282-TSZ

**MOTION FOR LEAVE TO FILE
SUPPLEMENTAL
DECLARATION IN SUPPORT
OF DEFENDANT PILLPACK
LLC'S OPPOSITION TO CLASS
CERTIFICATION**

NOTE ON MOTION CALENDAR:
September 18, 2020

I. INTRODUCTION

Defendant PillPack LLC ("PillPack") respectfully requests leave to file the Supplemental Declaration of Daniel J. Barsky in Support of PillPack LLC's Opposition to Class Certification, attached as **Exhibit 1** ("Supplemental Barsky Declaration"), which was recently provided to PillPack by a third party. The Supplemental Barsky Declaration both corrects and supplements the Declaration of Daniel J. Barsky in Support of PillPack LLC's Opposition to Class Certification (Dkt. 69) filed with PillPack's Opposition to Plaintiff's Motion for Class Certification ("Opposition to Class Certification") (Dkt. 60) on August 21, 2020. Good cause exists for the Court to grant leave and consider the Supplemental Barsky Declaration because PillPack did not receive the declaration until yesterday, August 31, 2020, the information in it is material to PillPack's Opposition to Class Certification, and Plaintiff has an adequate opportunity to review and respond to the declaration's contents.

II. BACKGROUND

On August 21, 2020, PillPack submitted its Opposition to Plaintiff's Motion for Class Certification. *See* Dkt. 60. In support, PillPack filed the Declaration of Daniel J. Barsky in Support of PillPack LLC's Opposition to Class Certification ("Original Barsky Declaration"), provided by the General Counsel of third-party Fluent, Inc., and its wholly owned subsidiaries ("Fluent"). *See* Dkt. 69. Yesterday, August 31, 2020, Mr. Barsky provided PillPack with the Supplemental Barsky Declaration, which both supplements and corrects the Original Barsky Declaration. *See* Exhibit 1. Mr. Barsky informed PillPack's undersigned counsel that due to resource constraints at Fluent, he was unable to provide the additional information in the Supplemental Barsky Declaration by the August 21, 2020, deadline for PillPack's Opposition to Class Certification, and that he executed the Supplemental Barsky Declaration as soon as that information was available to him.

The Supplemental Barsky Declaration supports PillPack's argument that individualized issues of consent predominate. *See* Dkt. 60 at 10-13. Read together with the Original Barsky Declaration, it demonstrates that over 15,800 calls reflected in the Prospects DM call records on which Plaintiff relies were placed to individuals who provided prior express written consent within the meaning of the Telephone Consumer Protection Act ("TCPA") to be called by Support First on Fluent's websites. *See* Exhibit 1 ¶¶ 4-7; Dkt. 69 ¶¶ 6-10. The Supplemental Barsky Declaration further identifies four specific examples of consumers who, through various Fluent websites, provided TCPA-compliant consent to receive calls from Support First and whose phone numbers appear in the Prospects DM call records. *See* Exhibit 1 ¶ 8. Additionally, the Supplemental Barsky Declaration corrects an error in the Original Barsky Declaration's description of the campaign in which Fluent provided Yodel with over 5 million leads who had consented to receive marketing calls from Support First. *See id.* ¶ 2 (correcting ID number used to reference lead generation campaign discussed in both declarations).

1 Plaintiff will have an opportunity to review and respond to the Supplemental Barsky
 2 Declaration, as Plaintiff's reply to PillPack's Opposition to Class Certification is due September
 3 4, 2020. *See* Dkt. 27.¹

4 III. ARGUMENT

5 When a party seeks to supplement the record with respect to a prior filing, courts in this
 6 district determine whether "good cause" exists to consider the additional evidence. *See, e.g.,*
 7 *Rygg v. Hulbert*, 2013 WL 1755921, at *1 n.1 (W.D. Wash. Apr. 24, 2013) (Robart, J.) (granting
 8 motion for leave to supplement the record upon finding "good cause" to consider supplemental
 9 evidence); *Hartman v. United Bank Card, Inc.*, 2012 WL 4792926, at *1-2 (W.D. Wash. Oct. 9,
 10 2012) (Lasnik, J.) (applying Fed. R. Civ. P. 16(b)(4) "good cause" standard to motion to
 11 supplement record with respect to class certification motion), *rev'd on other grounds* by 2013
 12 WL 12120424 (W.D. Wash. Jan. 2, 2013); *Cascade Yarns*, 2014 WL 4925487, at *2 (Martinez,
 13 J.) (applying "good cause" standard to motion to supplement record with respect to summary
 14 judgment motion). Here, good cause exists for the Court to consider the Supplemental Barsky
 15 Declaration on numerous grounds.

16 **First**, PillPack is diligently providing the Supplemental Barsky Declaration to the Court
 17 and Plaintiff within one day of receiving it. *See* Exhibit 1 (executed on August 31, 2020). At no
 18 fault of PillPack's, the information in the Supplemental Barsky Declaration was not available by
 19 the August 21, 2020, deadline for PillPack's Opposition to Class Certification or before
 20 yesterday, August 31, 2020. The short delay in providing the Supplemental Barsky Declaration
 21 was beyond PillPack's control and due to resource constraints at third-party Fluent.

22 **Second**, Plaintiff will not be prejudiced by the delayed filing of the Supplemental Barsky
 23 Declaration. PillPack is providing the Supplemental Barsky Declaration to Plaintiff in advance
 24 of Plaintiff's September 4, 2020, deadline to file a reply to PillPack's Opposition to Class
 25

26 ¹ PillPack is also producing an unredacted version of the Supplemental Barsky Declaration to Plaintiff upon the
 27 filing of this Motion.

1 Certification. Plaintiff, therefore, will have an opportunity to respond to the Supplemental
2 Barsky Declaration in his reply.

3 **Third**, PillPack's filing of the Supplemental Barsky Declaration will not delay the
4 Court's consideration of class certification because Plaintiff's Motion for Class Certification and
5 the related briefing are not yet ripe for review. *See* Dkt. 29 (noted on motion calendar for
6 September 4, 2020).

7 **Fourth**, the information in the Supplemental Barsky Declaration is material to the
8 Court's consideration of the class certification briefing in this case. The Supplemental Barsky
9 Declaration demonstrates that individuals within Plaintiff's class definition provided TCPA-
10 compliant consent through Fluent's websites to receive calls from Support First. *See* Exhibit 1
11 ¶¶ 4-8; Dkt. 69 ¶¶ 6-9. It also shows that the roughly 15,900 calls Fluent identified in Prospects
12 DM's call records to phone numbers of individuals who provided such consent are just the tip of
13 the iceberg, as Fluent analyzed only four of nine Prospects DM call record files and compared
14 those records to only "one of several campaigns" in which Fluent provided leads to Prospects
15 DM's lead source Yodel. *See* Exhibit 1 ¶¶ 3-7. As explained in PillPack's Opposition to Class
16 Certification, individualized inquiries are necessary to determine, at a minimum, whether each
17 person who provided Fluent with their phone number also provided TCPA-compliant consent to
18 be called, whether Prospects DM called each of these consumers under the dba "Support First"
19 (or instead called under "Senior Help Advisors," as it did in the calls to Plaintiff), and whether
20 each consumer who provided consent was the same person whom Prospects DM called. *See*
21 Dkt. 60 at 11.

22 On motions to supplement the record with respect to summary judgment, courts in this
23 district have observed that "public policy favors the disposition of matters on their merits and on
24 the most complete available and admissible record." *Cascade Yarns, Inc. v. Knitting Fever, Inc.*,
25 2014 WL 4925487, at *2 (W.D. Wash. Sept. 30, 2014) (citing *In re Phenylpropanolamine (PPA)*
26 *Prods. Liab. Litig.*, 460 F.3d 1217, 1228 (9th Cir.2006) (en banc)). "By a similar token,
27 disposition of a case on a more complete record must be preferred to disposition on a less

complete record.” *Block v. Solis*, 2010 WL 2079688, at *9 (W.D. Wash. May 20, 2010). The same principles apply here. A complete record will assist the Court in deciding whether a class action is an appropriate vehicle for adjudicating Plaintiff’s claims.

IV. CONCLUSION

For the foregoing reasons, PillPack respectfully requests the Court grant PillPack leave to file the Supplemental Barsky Declaration and consider the Supplemental Barsky Declaration with respect to PillPack’s Opposition to Class Certification.

DATED this 1st day of September, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

DATED this 1st day of September, 2020.

s/ Sara A. Fairchild

Sara A. Fairchild, WSBA #54419

EXHIBIT 1

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

AARON WILLIAMS, on behalf of himself and
all others similarly situated,

Plaintiff,

v.

PILLPACK LLC,

Defendant.

No. 3:19-cv-05282-RBL

SUPPLEMENTAL
DECLARATION OF DANIEL J.
BARSKY IN SUPPORT OF
PILLPACK LLC'S OPPOSITION
TO CLASS CERTIFICATION

I, Daniel J Barsky, hereby declare as follows:

1. I am the General Counsel, Chief Compliance Officer, and Secretary for Fluent, Inc. and its wholly owned subsidiaries (collectively "Fluent"). The information in this Declaration supplements a Declaration I previously supplied on August 21, 2020 (the "Original Declaration") and is based on my own personal knowledge. I submit this Supplemental Declaration in connection with the complaint in Williams v. PillPack.

2. I discovered that the reference to the "Yodel 10863 Campaign" in the Original Declaration was meant to refer to the Yodel campaign with a Campaign ID of 10865; all information provided in the Original Declaration related to the Yodel 10865 Campaign.

3. The Yodel 10865 Campaign is one of several campaigns conducted by Fluent for Yodel during 2018 and the first half of 2019.

4. Pillpack provided Fluent with nine files in CSV format with approximately 500,000 records in each file (each a "CSV File") from spreadsheets bearing the following Bates Stamps: ProspectsDM_000036 through ProspectsDM_000044.

BARSKY DECLARATION IN SUPPORT OF
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1 5. I requested a member of Fluent's IT team to determine how many of the records
2 in four of the CSV Files were included in the approximately 5 million leads (the "Sold Leads")
3 sold to Yodel in the Yodel 10865 Campaign described in the Original Declaration.

4 6. Each of the Sold Leads included data only of users who had provided their prior
5 express written consent within the meaning of the TCPA, through the process described in the
6 Original Declaration. Fluent has many pieces of data on each user including, for example,
7 name, email address, telephone number, user's IP address, the landing URL of the Fluent
8 website and the date/time stamp when TCPA Consent was granted.

9 7. The following are the results of comparing the records in the four CSV Files
10 with records in the Sold Leads:

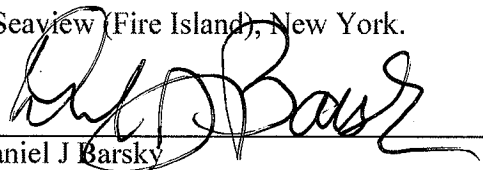
Bates Stamp	No. of Records in both CSV File and Sold Leads
ProspectsDM_000036	3,908
ProspectsDM_000037	3,963
ProspectsDM_000038	5,686
ProspectsDM_000039	2,340

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18 8. The following are select user data, one from each of the four CSV Files, who
19 were in both the CSV File and the Sold Leads:

ProspectsDM File	Name	Email Address	Telephone Number	User IP Address	Landing URL	Date/Time Stamp of TCPA Consent
000036	Denona	██████████@mail.com	██████████0226	██████████	electronicproductzone.com/	4/17/18 12:02 PM
000037	Kathie	██████████@yahoo.com	██████████4119	██████████	instantplaygiveawayentry.com/	8/11/18 2:00 PM
000038	Tonya	██████████@gmail.com	██████████0295	██████████	www.retailproductzone.com	5/20/18 2:16 AM
000039	Jon	██████████@charter.net	██████████0179	██████████	retailproductzone.com	4/2/18 9:53 AM

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31st day of August, 2020, at Seaview (Fire Island), New York.


Daniel J Barsky